

**Peets, Toya - ESA**

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**From:** Thomas H. Nail [Tom.Nail@thomashouston.com]  
**Sent:** Thursday, May 27, 2004 12:11 PM  
**To:** ofccp-public@dol.gov  
**Subject:** Comments on the Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes

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**THOMAS HOUSTON associates, inc.**

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HUMAN RESOURCE CONSULTANTS

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27 May 2004

Joseph DuBray, Jr., Director  
Division of Policy, Planning and Program Development  
Office of Federal Contract Compliance Programs  
Room C-3325  
200 Constitution Avenue, NW  
Washington DC 20210

**Re:** Comments on the Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes.

Dear Mr. DuBray:

THOMAS HOUSTON associates, inc. welcomes this opportunity to present its views on the Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes.

**About THOMAS HOUSTON associates, inc.**

THOMAS HOUSTON associates, inc. is a leading nationwide provider of Affirmative Action Plan and OFCCP compliance review consulting services. Since 1978, the firm has written more than 10,000 Affirmative Action Plans for federal contractors and subcontractors and has represented its clients in more than 600 OFCCP compliance reviews. THOMAS HOUSTON associates, inc. has made a significant effort to ascertain the views of its client companies, the very group that will have to implement the proposed Adoption of Additional Questions and Answers. These views, along with the views of THOMAS HOUSTON associates inc., are presented next.

THOMAS HOUSTON associates, inc. shares the goal of the OFCCP to provide interpretation and guidance to federal contractors and subcontractors who have enforcement responsibilities under the Uniform Guidelines on Employee Selection Procedures. We also understand the employer's obligation to avoid discriminatory practices regardless of the definition of an applicant.

Unfortunately, despite nearly four years in the making and the best efforts of the OFCCP, the proposed OFCCP regulations fall far short of the needs of the contractor community.

Please also refer to the letter (attached at the end of this email) containing responses to the combined agencies proposed Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as they Relate to The Internet and Related Technologies.

Rather than reiterating the contents of the attached letter, they are summarized below in the context of the federal contractor/subcontractor community and the OFCCP.

- 1) The OFCCP should develop a single recordkeeping system for traditional and Internet applicants. This will not only ease the burden of the contractor community to maintain records but also eliminate confusion surrounding Impact Ratio calculations and how they should be calculated for traditional and Internet applicants.
- 2) If the OFCCP contemplates additional scrutiny of a contractor's relevant applicant pool versus labor force statistics, the agency should provide guidance to the contractor community to enable compliance and critical self-analysis.
- 3) THOMAS HOUSTON associates, inc. commends the OFCCP recognizing that an applicant must meet basic job qualifications. However, use of the term "advertised, basic qualifications" is ambiguous. It is certainly possible that a qualification may be pre-determined and established but not advertised especially in those instances where a job seeker sends a resume to the contractor without responding to a specific opening. The term "advertised" is also ambiguous as no guidance is proposed by the OFCCP to define "advertised."

THOMAS HOUSTON associates, inc. suggests that a more appropriate terminology might be "established minimum qualifications."

- 4) The OFCCP proposed regulations should provide guidance on how to fulfill the obligation of ascertaining race, ethnicity, and gender information of applicants. The OFCCP might outline a general procedure for contractors to follow in soliciting race and gender information that addresses how soon in the process the data may be requested and how often it may be requested. This type of guidance would be most helpful to the contractor community because the success rate of contractors receiving the requested information varies considerably.

The issue of recordkeeping requirements for applicants with an unknown race and/or gender is also not addressed by the OFCCP proposed regulations. Impact ratio analysis and any other critical self-analysis is impossible with an applicant pool consisting of individuals with unknown race and/or gender. Some contractors, when faced with not knowing the race of an applicant, will attempt to guess the applicant's race based on information contained in the resume. The potential is certainly high for the contractor to guess incorrectly. If a contractor guesses that the applicant is a minority and he or she is not, the contractor is in the unfavorable position of having to defend the non-hiring of a minority who is not a minority. Similarly, if the contractor guesses

that the applicant is non-minority, then it may be demonstrating a lack of good faith effort in recruiting minorities. The OFCCP should state that individuals who do not provide race or gender information when asked to do so by the contractor are not UGESP applicants.

- 5) If the OFCCP proposes to require contractors to retain records of all submissions of interest through the Internet or related electronic technologies, then guidance should be provided. For example, for how long must the submission be retained and in what format?
- 6) Finally, we take issue with the OFCCP's assertion that implementing the OFCCP proposed regulations will not involve an increase in paperwork burdens associated with attempts to apply existing guidelines to the context of the Internet and related technologies. On the contrary, for the reasons stated above, the OFCCP proposed regulations will increase contractor confusion surrounding the issue of who is an applicant and increase the recordkeeping requirements of maintaining two separate applicant flow systems. Further, contractors may become subject to new ways in which to be scrutinized by the OFCCP if they implement any efforts to manage their applicant pool.

## Conclusion

If the OFCCP is unsure whether the dual standard of Internet and traditional applicants will provide the agency with meaningful contractor data, why is it proposing a dual standard?

The contractor community needs a clear and well articulated strategy that is general enough to account for variations by industry, business type, size, etc. but is specific enough to provide meaningful guidance. The OFCCP should revise its proposed regulations to provide all users with a single definition of an applicant. Most employers want to comply with the principles of Equal Opportunity and Affirmative Action and perform their own critical self-analysis if they are given enough information to implement a strategy effectively. The proposed OFCCP regulations fall far short of this objective. We encourage the OFCCP to go back to the drawing board and frame out a comprehensive strategy dealing with the applicant issue that eliminates any dual standard.

It is our sincere hope that the OFCCP will find the comments above to be useful. If we can answer any questions regarding our comments, please contact the undersigned at our Herndon, Virginia office.

Yours sincerely,

THOMAS HOUSTON associates, inc.



Thomas H. Nail  
President

Below Attachment: Responses to the combined agencies proposed Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as they Relate to The Internet and Related Technologies.

# THOMAS HOUSTON associates, inc.

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28 April 2004

Frances M. Hart  
Executive Officer  
Executive Secretariat  
Equal Employment Opportunity Commission  
1801 L Street, NW, 10<sup>th</sup> Floor  
Washington DC 20507

**Re:** Comments on the EEOC, OFCCP, DOJ, and OPM proposed Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures as they Relate to The Internet and Related Technologies.

Dear Ms Hart:

THOMAS HOUSTON associates, inc. welcomes this opportunity to present its views on the EEOC, OFCCP, DOJ, and OPM proposed adoption of Additional Questions and Answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures as they relate to the Internet and related technologies.

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THOMAS HOUSTON associates, inc. shares the goal of the EEOC and its associated agencies to provide interpretation and guidance to employers and other users and federal personnel who have enforcement responsibilities under the Uniform Guidelines on Employee Selection Procedures. We also understand the employer's obligation to avoid discriminatory practices regardless of the definition of an

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applicant.

Unfortunately, despite nearly four years in the making and the best efforts of all agencies, the proposed Adoption of Additional Questions and Answers falls far short of the needs of the employer community.

Most troubling is the EEOC's apparent creation of two parallel but separate recordkeeping systems for traditional and Internet applicants. This will presumably create the need for two sets of applicant flow activity tables in the Affirmative Action Plan as well as the need to conduct the Impact Ratio Analysis separately for traditional and Internet applicants. The proposed Adoption of Questions and Answers does not address whether or not employers are required to prepare impact ratio calculations separately for traditional and Internet applicants or whether or not the two recordkeeping systems should be combined into one. The creation of two separate but parallel systems represents not only an added burden for the employer community, but it also presents the possibility that the OFCCP will judge employers in new ways.

For example, if an employer takes steps to minimize or eliminate traditional methods of accepting applicants and accepts only Internet applicants, it runs the risk of its applicant pool becoming non-representational of the community. Thus, by establishing a procedure with the fullest intent of complying with Adoption of Questions and Answers, the employer is in a classic catch-22 position. By keeping two parallel recordkeeping systems, the employer faces an increased recordkeeping burden. If an employer chooses to minimize or eliminate traditional applicants, the employer will probably face a new type of scrutiny from the OFCCP. The potential also exists for employers to set up an Internet system that may screen out minorities who may have less access to electronic means; again, inviting increased scrutiny from the EEOC and the OFCCP. If indeed the OFCCP contemplates additional scrutiny in this area, the agency should provide guidance on any new processes, methodologies, or thinking so that employers will have increased information available to them and be able to do their own critical self analysis.

The proposed Adoption of Questions and Answers does not directly address the issue of minimum qualifications. The EEOC should specifically address the question of whether or not an applicant must possess the minimum qualifications as defined by the employer in order to be considered an applicant. Is it the intent of the proposed Adoption of Questions and Answers to imply that following the employer's standard procedures extends to also meeting the minimum advertised job qualifications? If Internet job seekers must meet minimum advertised job qualifications to become an applicant, then a dual standard is created for Internet applicants vs. traditional applicants necessitating the added burdens previously referenced. The EEOC should therefore revise the proposed Adoption to provide all users with a single definition of an applicant. The definition may have many facets; however, the definition should be inclusive of both Internet and traditional applicants. If the EEOC chooses not to do this, then, at a minimum, it should address the extent to which the Internet guidelines crossover for traditional applicants.

Much of the guidance contained in the Additional Questions and Answers assumes that employers of all sizes have a sophisticated electronic process already in place that can be used to automatically select resumes with the desired qualifications. In the clients we surveyed, this was not the case. Many clients recruit using traditional recruiting methods and the results of the search are transmitted to the employer via e-mail instead of paper. This suggests a hybrid method of recruitment, which is somewhere between the traditional method of recruitment and the Internet method of recruitment, that is not addressed by the Additional Questions and Answers. The Additional Questions and Answers are not clear as to whether any hybrid method of recruitment will be viewed as a traditional or Internet recruitment method.

The Adoption of Questions and Answers should provide guidance on how to fulfill the obligation of

ascertaining race/gender information of applicants. The EEOC might outline a general procedure for employers to follow in soliciting race and gender information that addresses how soon in the process the data may be requested and how often it may be requested. This type of guidance would be most helpful to the employer community because the success rate of employers receiving the requested information varies considerably.

The issue of recordkeeping requirements for applicants with an unknown race and/or gender is also not addressed by the Adoption of Questions and Answers. Impact ratio analysis and any other critical self analysis is impossible with an applicant pool consisting of individuals with unknown race and/or gender. Some employers, when faced with not knowing the race of an applicant, will attempt to guess the applicant's race based on information contained in the resume. The potential is certainly high for the employer to guess incorrectly. If an employer guesses that the applicant is a minority and he or she is not, the employer is in the unfavorable position of having to defend the non-hiring of a minority who is not a minority. Similarly, if the employer guesses that the applicant is non-minority, then it may be demonstrating a lack of good faith effort in recruiting minorities. The EEOC should state that individuals who do not provide race or gender information when asked to do so by the employer are not UGESP applicants.

The proposed Adoption of Questions and Answers also does not address whether or not resumes must be retained for those who express an interest in employment but do not meet the definition of an applicant. Is the employer required to retain resumes for individuals who do not meet the technical definition of an applicant? If so, for how long must an employer retain the resumes?

Finally, we take issue with the EEOC's assertion that implementing the Additional Questions and Answers will not involve an increase in paperwork burdens associated with attempts to apply existing guidelines to the context of the Internet and related technologies. On the contrary, for the reasons stated above, the Additional Questions and Answers will increase employer confusion surrounding the issue of who is an applicant and increase the recordkeeping requirements of maintaining two separate applicant flow systems. Further, employers may become subject to new ways in which to be scrutinized by the OFCCP if they implement any efforts to manage their applicant pool.

## Conclusion

The employer community needs a clear and well articulated strategy that is general enough to account for variations by industry, business type, size, etc. but is specific enough to provide meaningful guidance. The EEOC should revise the proposed Adoption of Questions and Answers to provide all users with a single definition of an applicant. Most employers want to comply with the principles of Equal Opportunity and Affirmative Action and perform their own critical self analysis if they are given enough information to implement a strategy effectively. The proposed Adoption of Questions and Answers falls far short of this objective. We encourage the EEOC to go back to the drawing board and frame out a comprehensive strategy dealing with the applicant issue.

It is our sincere hope that the combined agencies will find the comments above to be useful. If we can answer any questions regarding our comments, please contact the undersigned at our Herndon, Virginia office.

Yours sincerely,

THOMAS HOUSTON associates, inc.

*Thomas H. Nail*

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President

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